LEONG AH TEE

v.

SOO AH HING

HIGH COURT MALAYA, IPOH
PS GILL J
[CIVIL SUIT NO: 22-34-99]
11 JUNE 1999

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application for - Whether a good arguable claim - Whether serious questions to be tried - Balance of convenience - Whether damages an adequate remedy - Specific Relief Act 1954, s. 11(2)*

LANDLORD AND TENANT: *Agreement - Tenancy agreement - Sale of property to 3rd party - Whether tenant was given right of pre-emption - Whether in breach of tenancy agreement - Option and right of pre-emption - Distinction - Whether price should be ascertained - Whether consideration given*

This was the plaintiff's application for an interlocutory injunction to restrain the defendant from disposing a certain property ('the property'). The plaintiff was the tenant and the defendant was the landlord of the property. The plaintiff claimed that the defendant had entered into an agreement to sell the property to a 3rd party in breach of cl. 3(v) of the tenancy agreement made between the parties. Clause 3(v) of the tenancy agreement provided that if the defendant chose to sell the property to a 3rd party, the plaintiff should have the option to purchase it, and that if the plaintiff decided not to purchase the property, the defendant would be able to dispose it to a 3rd property.

The defendant claimed, *inter alia*, that the plaintiff was not entitled to his right of purchase as the tenancy agreement had already expired.

Held:

[1] The tenancy agreement sets out the parties mutual contractual rights and obligations which was specifically enforceable. The fact that the tenancy had expired on 30 September 1998 was immaterial since negotiations had begun in July 1998 and proceeded to October 1998. It was only in November 1998 that the defendant had written rescinding the final offer of his to sell the property to the plaintiff. The course of correspondence showed that the defendant had waived whatever time frame there was in the tenancy agreement. To insist now that the plaintiff was disentitled to his right of purchase of the property in view of the fact that the tenancy had already expired by 30 September 1998 was wholly inequitable.

[2] Clause 3(v) of the tenancy agreement was nothing more than a right of first refusal (pre-emption). It was not an agreement to agree and did not purport to impose a future or a contingent contract on the parties. It only imposed an obligation or a duty to make the plaintiff an offer for sale should the defendant wish to sell. Further, the price of the property had not been agreed.

[3] Under a right of pre-emption, two steps are usually necessary, *ie*, the making of an offer in accordance with the right of pre-emption, and the acceptance of that offer. The failure to provide either a price or a formula for ascertaining the price is accordingly far more serious in the case of an option than under a pre-emption. He who exercises such an option will virtually be signing a blank cheque whereas he who is entitled to a right of pre-emption can at least refrain from accepting the grantor's offer of the price if it is too high.

[4] The submission of the defendant that there was no consideration for the right of first refusal must fail. The right of first refusal was one of the covenants in the lease for which consideration already existed and which imposed an obligation on the defendant to offer.

[5] This court was highly suspect of the manner in which the defendant conducted the sale of the said premises to the 3rd party. The plaintiff had established a good arguable claim.

[6] Only a full trial would determine the intentions of the respective parties and whether they had complied with their respective obligations and whether if at all the defendants had acted in breach of cl. 3(v) of the tenancy agreement. At this interlocutory stage, there were serious questions to be tried.

[7] In exercising the discretion on the balance of convenience, the presumption laid down in s. 11(2) of the Specific Relief Act 1954 was applicable.

[8] In light of the multitude of issues adumbrated above which could only be resolved at the trial by way of *viva voce* evidence, the *status quo* in relation to the property must be preserved.

[Interlocutory injunction granted. Early trial of suit ordered.]

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Seng Hoe Bhd & Ors [1995] 1 AMR 549 ***(refd)***

American Cyanamid & Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Brown v. Gould [1972] Ch 53 ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(refd)***

Keet Gerald, Francis Noel John v. Mohd Noor Abdullah [1995] MLJ 193 ***(refd)***
Mackay v. Wilson [1947] 47 SR (NSW) 315 ***(refd)***
Smith v. Morgan [1971] 1 WLR 803 ***(refd)***
Pritchard v. Briggs [1980] Ch 338 ***(refd)***

Legislation referred to:
Specific Relief Act 1954, s. 11(2)

Other source(s) referred to:
Supreme Court Practice, 1993, vol 1, part 1, p 511

For the plaintiff - Sonia Mahendran; M/s Mahendran & Co
For the defendant - Guok; M/s Jaswant & Loh

Reported by Usha Thiagarajah

JUDGMENT

PS Gill J:

The question for determination in this application encl. 3, is whether an interlocutory injunction should be granted to the plaintiff to restrain the defendant from disposing property known as No. 95, Jalan Canning Estate, Ipoh Garden ("the premises").

The plaintiff's application is based on the defendant's alleged breach of a tenancy agreement namely cl. 3(v) dated 1 May 1995 executed between the plaintiff (as tenant) and the defendant (as landlord) (exh. LAT-1 encl. 2 – the "agreement"). The defendant on the other hand denies the alleged breach and contends that the said clause has been complied with on his part and any default was entirely the fault of the plaintiff.

Facts Which Are Not Disputed

(1) The plaintiff entered into a tenancy agreement with the defendant for a term of three years commencing 1 May 1995.

(2) Clause 3(v) of the agreement provided that if the defendant as landlord intended to sell the demised premises during the terms hereby granted, the plaintiff as tenant shall have the option to purchase the same at the prevailing market price. In the event that the tenant/plaintiff intends not to purchase, the landlord shall be at liberty to dispose the demised premises to any third party.

(3) The defendant had in July 1998 intended to sell the said premises. Pursuant to cl. 3(v) of the agreement the defendant had informed the plaintiff of his said intention, and the parties had entered into negotiations.

A letter from the defendant, through his solicitors dated 4 July 1998 was sent to the plaintiff, informing him of his intention to sell the said property.

(4) On 1 August 1998 the plaintiff wrote to the defendant offering to purchase the said premises for the sum of between RM180,000 to RM200,000.

(5) The defendant replied stating that the said price offered by the plaintiff was low and it was not according to the prevailing market price.

(6) The defendant had on 13 October 1998, written to the plaintiff offering to sell the said premises for the sum of RM295,000.

(7) The defendant had on 12 November 1998, sent a letter to the plaintiff revoking the letter of offer dated 13 October 1998.

(8) The defendant admits to having since entered into an agreement to sell the said property to a third party namely Chai Kok Choong. The property has yet to be transferred to the third party.

Facts Which Are Disputed

(1) The plaintiff asserts that the current market price for the said property between the region of RM180,000 to RM200,000 whilst the defendant denies this and categorically states that the said premises is worth RM295,000.

(2) The plaintiff states that in view of the fact that the said premises was his place of business, on receipt of the defendant's letter dated 13 October 1998, offering to sell the premises at RM295,000 he had a week, after receiving the said letter, communicated his acceptance of the said offer by way of telephonic conversation. Needless to say the defendant denies ever having such a conversation, and much less that a contract was concluded at that point of time. The defendant merely agrees that the plaintiff telephoned him about three weeks after receiving his letter and informed him instead, that he was unable to obtain a loan of RM295,000. It was as a consequence of this conversation that the defendant revoked his letter of offer dated 13 October 1998.

(3) The plaintiff maintains that the premises was eventually sold to a 3rd party namely Chai Kok Choong for a sum of RM220,000 which was the sum that he eventually was prepared to pay for the said premises. A copy of the agreement between the defendant and the third party was tendered by the plaintiff in support of this. The defendant on the otherhand contended that there was a supplementary agreement to this main agreement wherein

an additional sum of RM70,000 was agreed by the third party/vendor to be paid to the defendant as remuneration for certain services and task rendered in respect of the sale of the said premises.

(4) The plaintiff asserts that at the point of time the offer to sell the property was made to him, the tenancy between him and the defendant was still in existence. Admittedly the tenancy had expired on 30 September 1998. Having said this, negotiations were still being pursued by both parties culminating in the letter of final offer by the defendant, to the plaintiff dated 13 October 1998. The defendant on the otherhand contends that since the tenancy of the plaintiff had expired on 30 September 1998, the plaintiff had no right to enforce any aspect of the tenancy agreement.

Should An Interlocutory Injunction Be Granted To The Plaintiff

The principles to be applied in an application for interlocutory injunction have been established in *American Cyanamid & Co v. Ethicon Ltd* [1975] AC 396 and subsequently applied in *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 and *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Seng Hoe Bhd and 2 Ors* [1995] 1 AMR 549, 612. These principles have also been summarised in the *Supreme Court Practice*, 1993, vol. 1, part 1 p. 511 as follows:

(1) The plaintiff must establish that he had a good arguable claim to the right he seeks to protect.

(ii) The court must make no attempt to decide this claim on affidavits, it is enough if the plaintiff show that there is a serious question to be tried.

(3) If the plaintiff satisfied these tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on a balance of convenience.

The plaintiff submits that it has more than satisfied each of these requirements, while the defendant contends that no purpose is served by this injunction, primarily because the tenancy has come to an end, the plaintiff has no right to commence this cause of action. Further the defence contends that there was no consideration to support the option clause, in the said tenancy agreement.

Before I embark on considering the principles of interlocutory injunction, in conjunction, with the present case, I wish to say that at the outset of the hearing I had ordered in view of the conflict on the affidavit evidence of both the plaintiff and defendant, cross examination of the deponents.

Good Arguable Claim

In my judgment, the tenancy agreement sets out the parties mutual contractual rights and obligations, which to my mind is specifically enforceable. The fact that the tenancy had expired on 30 September 1998, is immaterial, since negotiations had begun in the July of 1998, and proceeded on to until the October of 1998. It was only in November 1998, that the defendant had written rescinding the final offer of his to sell the property to the plaintiff. The course of correspondence evidently shows that the defendant had waived whatever time frame there was in the tenancy agreement. To insist now that the plaintiff were disentitled to their rights of purchase of the premises in view of the fact that the tenancy had already expired by 30 September 1998 is wholly inequitable.

I have scrutinized cl. 3(v) of the said agreement which for ease of reference I shall reproduce:

> If the Landlady intends to sell the Demised premises during the terms hereby granted, the Tenant shall have the option to purchase the same at the prevailing market price. In the event that the Tenant intends not to purchase, the Landlady shall be liberty to dispose the Demised Premises to any third party/parties and thereafter it shall be the discretion of the third party/parties to continue this tenancy with the Tenant with terms and conditions to be mutually agreed upon.

I find that the clause itself despite its label is nothing more than a right of first refusal (pre-emption). It is not an agreement to agree, and, does not purpot to impose a future, or a contingent contract, on the parties. It only imposes an obligation, or a duty, to make the plaintiff an offer for sale should the defendant wish to sell.

In *Smith v. Morgan* [1971] 1 WLR 803 the plaintiff conveyed to the defendant a dwelling house and certain land, including part of a barn, for pound sterling 3,250. The plaintiff covenanted not to sell certain adjoining land, including the other part of the barn, for five years and at the expiration of that period or at any later time should the plaintiff wish to sell the adjoining land she would give the defendant the first option of purchasing it "at a price to be agreed upon", any such offer for sale to remain open for three months from the making of the offer. The court held that on its true construction, the covenant was not void as being merely an agreement to agree, but imposed an obligation on the plaintiff, should she wish to sell the adjoining land, to offer it first to the defendant, at a price and at no mere than the price at which she was in fact prepared to sell.

Like the case of *Smith v. Morgan*, the price in this particular instance had not been agreed. In the circumstances I have no hesitation in concluding that

cl. 3(v) ought to mean only one thing, that the obligation of the defendant, should he decide to sell the demised premises, he shall give the plaintiff the first right of refusal to purchase, at the prevailing market price. If such an offer when made is accepted by the plaintiff then there will be a purchase, if the offer is rejected, then cadet quaestio. In *Brown v. Gould* [1972] Ch 53 Megarry J drew the distinction between an option and a right of pre-emption in the following terms:

> Under a right of pre-emption, two steps will usually be necessary, the making of the offer in accordance with the right of pre-emption, and the acceptance of that offer. The failure to provide either a price or a formula for ascertaining the price is accordingly far more serious in the case of an option than under a pre-emption: he who exercises such an option may well be virtually signing a blank cheque, whereas he who is entitled to a right of pre-emption can at least refrain from accepting the grantor's offer if the price be too high.

The distinction between an option and a right of pre-emption was further elucidated by Street J in his judgment in the Australian case of *Mackay v. Wilson* [1947] 47 SR (NSW) 315 in the following passage:

> But an agreement to give 'the first refusal' or a right of pre-emption confers no immediate right upon the prospective purchase. It imposes a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer. It is not an offer and in itself it imposes no obligation on the owner of the land to sell the same. He may do so or not as he wishes. But if he does decide to sell, then the holder of the right of first refusal has the right to receive the first offer, which he also may accept or not as he wishes. The right is merely contractual and no equitable interest in the land is created by the agreement.

On the contention of the defendant's counsel that there was no consideration for the right of first refusal, the right of first refusal is to my mind one of the covenants in the lease for which consideration already exists, and which imposes an obligation on the vendor to offer. I have no hesitation therefore in holding that this submission of the defendant's counsel must perforce fail.

The Evidence Before The Court

Having perused the affidavits and heard the evidence of the deponents, it strikes me as being highly suspect, in the manner in which the defendant conducted the sale of the said premises eventually to the 3rd party namely Chai Kok Choong. From the documentary evidence tendered by the plaintiff, namely the sale and purchase agreement entered between the defendant and the third party, it refers to the sale price of the property being RM220,000 of which a deposit of RM22,000 was to be paid. The plaintiff had also in order

to corroborate the fact that only RM220,000 was tendered as payment of the purchase price, adduced in court, stamp duty clearance in respect of the transfer of the property, which once again established the selling price to be RM220,000.

The defendant as mentioned previously adduced in evidence a supplementary agreement dated 1 December 1998, which showed that apart from the sum of RM220,000 that was paid for the said property, a further sum of RM70,000 was agreed upon between the defendant and the third party was to quote "... renumeration for certain services and task rendered in respect of the sale". The ingenuity of the clause was subject to much comment by plaintiff counsel who submitted that the whole purport of this subsequent agreement, was to thwart the plaintiff's chances of purchasing the property, by insidiously entering into this supplementary agreement, and including in it, this rather nebulous clause for renumeration at a sum of RM70,000. There was according to plaintiff's counsel, no evidence whether the said sum had been paid, and whether it was all but a ploy of the defendant's part, to frustate any attempt on the plaintiff part to purchase the property.

The defendant submitted that the plaintiff was unable to financially obtain a loan for the said sum that was requested by him for the property, which he maintained was the current market price of the said premises. He denied that the supplementary agreement was contrived to frustrate the plaintiff's intention to purchase, but made no mention as to whether, the RM70,000 was paid. Up until now, there was only evidence that the deposit of RM22,000 was paid by the third party.

I am less than convinced at this stage that the premises was actually purchased for the sum of RM290,000 I have my reservations about the supplementary agreement entered between defendant and the third party, and to an extent am inclined to believe that the agreement was an afterthought a coup de grace to thwart the plaintiff's chances of purchasing the property. The stamp duty fortifies my view that the premises was disposed for RM220,000. I have reason to believe at this juncture at least, that the plaintiff was prepared eventually albeit unhappily to pay the sum of RM220,000 towards purchase of the premises.

I view of my observations, I hold that the plaintiff has established a good arguable claim.

Serious Question To Be Tried

Lord Diplock in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 in dealing with his requirement stated that the court must not attempt to decide the claim on affidavits. It would be sufficient if there are serious questions

to be tried. This case, as averted to above, was followed by the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 AMR 549 at 548 as follows:

> At an interlocutory proceeding for an injuction the court is not called upon nor is it desirable for the court to decide finally on the rights of the parties but the court must be satisfied that there is a serious issue to be tried. The court is not justified in embarking upon anything resembling the trial of the action upon conflicting affidavits nor to evaluate the strength of either party's case. This is settled law now hallowed by the famous words of Lord Diplock in the *American Cyanamid's* case:
>
> > ...It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult question of law which call for entailed arguments and mature consideration.

In *Keet Gerald, Francis Noel John v. Mohd Noor bin Abdullah* [1995] MLJ 193 Gopal Sri Ram JCA at p. 206 held as follows:

> To summarise, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (1) he must ask himself whether the totality of the facts presented before him discloses a *bone fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at the stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial ...

In my judgment only a full trial would determine, the intentions of the respective parties and whether they had complied with their respective obligations, and whether if at all the defendants had acted in breach of cl. 3(v) of the tenency agreement.

Suffice it to say at this interlocutory stage are several questions to be tried, as I have enumerated under the heading in relation to a "good arguable claim".

Balance Of Convenience

When consideration the balance of convenience, one of the factors to the exercise of discretion is whether damages would be sufficient remedy and if so an injunction ought not to be granted. In exercising the discretion on the balance of convenience, I am guided by the presumption laid down in s. 11(2) of the Specific Relief Act 1954 which reads:

Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

Conclusion

In the light of the multitude of issues adumbrated above which can be resolved only at the trial by way of *viva voce* evidence, I am of the view that the *status quo* in relation to the land must be preserved. I therefore grant an interlocutory injunction in terms of this application. In the interest of justice, I order an early trial of this suit.

As a postscript I wish to add that the plaintiff had lodged a caveat on the said property, which was subject to an action for removal of the said caveat by the defendant *vide* OS 24-102-99. I held that the right of pre-emption did not create any caveatable interest in the said land, *Pritchard v. Briggs* [1980] Ch 338 and accordingly ordered the removal of the caveat, forthwith.